Ng Chai Yang v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors

HIGH COURT (TAIPING) — ORIGINATING SUMMONS NO 24-6-1994(T)
ABDUL MALIK ISHAK JC
15 APRIL 1994

Criminal Procedure *— Habeas corpus — Invalid ground for application — Denial of access to counsel — Not contrary to Federal Constitution art 5(3)*

Criminal Procedure *— Habeas corpus — Procedure — Whether detainee's wife could affirm affidavit in support of application — Whether there was failure to state source and grounds of information and belief — Whether averments were hearsay — Rules of the High Court 1980 O 41 r 5(1) & (2)*

Criminal Procedure *— Habeas corpus — Procedure — Failure by Minister to rebut allegations in plaintiff's affidavit in support — Whether allegations deemed to be admitted — Whether necessary to rebut allegations — Rules of the High Court 1980 O 41 r 5(1) & (2)*

Criminal Procedure *— Habeas corpus — Restricted Residence Act 1933 — Plaintiff detained for 20 days before restriction order issued — Whether detention legal — Restricted Residence Act 1933 s 2(i) & (ii)*

Criminal Procedure *— Habeas corpus — Procedure — Failure of defendant to rebut allegations in plaintiff's affidavit in support — Whether irregularity could be cured — Rules of the High Court 1980 O 2 r 1*

Criminal Procedure *— Habeas corpus — Principles governing — Technical defects in restriction order — Right of plaintiff to avail himself of defects*

On 31 October 1993, the plaintiff was arrested and detained at Johor Bahru prison pursuant to an order made by the Deputy Minister of Home Affairs ('the Deputy Minister') under s 2(i) of the Restricted Residence Act 1933 ('the Act') on the ground that he had been running an illegal four-digit gambling operation in Muar, Johor since 1990. On 19 November 1993, the Deputy Minister issued a restriction order under s 2(ii) of the Act restricting the plaintiff to Kuala Kurau, Perak for three years commencing from 19 November 1993 and placing the plaintiff under police supervision during that period pursuant to s 2A(i) of the Act. Both orders were served on the plaintiff on 19 November 1993 but it was only on 20 November 1993 that the plaintiff was brought to Kuala Kurau.

In support of this habeas corpus application, the plaintiff's wife affirmed an affidavit averring that the plaintiff was brought to Tangkak police station on 19 November 1993 where she met the plaintiff. Consequently, it was argued that the Deputy Minister did not sign the orders under ss 2(ii) and 2A(i) of the Act on 19 November 1993 but that the orders were postdated. The plaintiff's wife further averred

A that while under lawful detention at Johor Bahru prison, her husband was denied: (i) access to counsel, contrary to the second limb of art 5(3) of the Federal Constitution; and (ii) access to writing materials and could not write to the Deputy Minister and, consequently, was unable to make an appeal within 14 days as required by the Deputy Minister.

B Counsel for the plaintiff argued as the plaintiff's wife's allegations were not rebutted by the defence, they should be deemed to be admitted. On the other hand, the federal counsel for the defendants argued that the plaintiff's wife had failed to state the sources and grounds of her information and belief as required under O 41 r 5(1) and (2) of the Rules of the High Court 1980 ('the RHC'), thus rendering the C allegations valueless as hearsay. The federal counsel argued that the failure of the plaintiff's wife to comply with O 41 r 5(1) and (2) of the RHC was a defect which went to the very root of the legal process and could not be cured. Consequently, the defendants need not reply to those allegations.

D **Held**, allowing the application for habeas corpus and ordering the release of the plaintiff:

(1) The plaintiff's complaint that he was denied access to counsel did not run counter to the second limb of art 5(3) of the Federal Constitution and was not therefore a ground for which the proper E remedy is habeas corpus.

(2) The plaintiff's wife had rightly affirmed an affidavit in support of the habeas corpus application and had adverted to her personal knowledge as she had met with the plaintiff in the Johor Bahru prison and was asked by him to obtain the services of counsel. She had explained her position and authority in affirming the affidavit F as she had been given the authority to do so by the plaintiff, in view of the fact that there was no commissioner for oaths in Kuala Kurau, Perak. The allegations contained in her affidavit had therefore complied with O 41 r 5(1) and (2) of the RHC.

(3) As the allegations of the plaintiff's wife had complied with O 41 G r 5(1) and (2) of the RHC, the allegations must be true as the defendants failed to rebut it in their affidavits.

(4) The prolonged detention of the plaintiff at Johor Bahru prison before the restriction order under s 2(ii) of the Act was issued was illegal, contrary to law and rendered the restriction order null and void and the Deputy Minister's feeble explanation for the delay H could not be accepted by the court.

(5) Although it is basic and fundamental that in the course of litigation, rules of procedure must be observed, no irregularity or defect automatically renders the proceeding a nullity as the court has a discretion under O 2 r 1 of the RHC to remedy any non-compliance I with a rule of procedure.

(6) However, where the liberty of an individual is at stake, there must be meticulous compliance with the law and in applying for a writ of habeas corpus, the plaintiff is entitled to avail himself of any

technical defects which may invalidate the order which deprives him of his liberty. The plaintiff was set at liberty forthwith. A

[Bahasa Malaysia summary

Pada 31 Oktober 1993, plaintif telah ditangkap dan ditahan di penjara Johor Bahru mengikut suatu perintah yang dibuat oleh Timbalan Menteri Hal Ehwal Dalam Negeri ('Timbalan Menteri') di bawah s 2(i) Akta Kediaman Terhad 1933 ('Akta itu') atas dasar bahawa beliau telah mengendalikan suatu operasi perjudian empat nombor ekor yang haram di Muar, Johor sejak 1990. Pada 19 November 1993, Timbalan Menteri telah mengeluarkan suatu perintah sekatan di bawah s 2(ii) Akta itu untuk menghadkan plaintif ke Kuala Kurau, Perak selama tiga tahun bermula dari 19 November 1993 dan meletakkan plaintif di bawah pengawasan polis untuk tempoh itu mengikut s 2A(i) Akta itu. Kedua-dua perintah telah disampaikan kepada plaintif pada 19 November 1993 tetapi plaintif telah dibawa ke Kuala Kurau hanya pada 20 November 1993. B C D

Untuk menyokong permohonan habeas corpus ini, isteri plaintif telah mengikrar suatu afidavit yang menyatakan bahawa plaintif telah dibawa ke balai polis Tangkak pada 19 November 1993 di mana beliau berjumpa dengan plaintif. Akibatnya, telah dihujahkan bahawa Timbalan Menteri tidak menandatangani perintah itu di bawah ss 2(ii) dan 2A(i) Akta itu pada 19 November 1993 tetapi bahawa tarikh perintah itu telah ditunda. Isteri plaintif seterusnya menegaskan bahawa semasa di bawah tahanan sah di penjara Johor Bahru, suami beliau telah dinafikan: (i) akses kepada peguambela, bertentangan dengan cabang kedua perkara 5(3) Perlembagaan Persekutuan; dan (ii) akses kepada alatulis dan tidak dapat menulis kepada Timbalan Menteri dan, akibatnya, tidak dapat membuat rayuannya dalam masa 14 hari seperti yang dikehendaki oleh Timbalan Menteri. E F

Peguamcara plaintif berhujah bahawa oleh kerana pengataan isteri plaintif tidak dipatahkan oleh pihak pembela, pengataan itu seharusnya dianggap sebagai diakui. Sebaliknya, peguam persekutuan bagi pihak defendan berhujah bahawa isteri plaintif telah gagal menyatakan sumber dan dasar maklumat dan kepercayaannya seperti yang diperlukan di bawah A 41 k 5(1) dan (2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dan dengan itu menyebabkan pengataan itu tidak berguna kerana ianya merupakan keterangan dengar cakap. Peguam persekutuan berhujah bahawa kegagalan isteri plaintif untuk mematuhi A 41 k 5(1) dan (2) KMT adalah suatu kecacatan yang menjejaskan akar umbi proses undang-undang dan tidak boleh dibetulkan. Akibatnya, defendan tidak perlu menjawab pengataan tersebut. G H

Diputuskan, membenarkan permohonan untuk habeas corpus dan memerintahkan pelepasan plaintif: I

(1) Aduan plaintif bahawa beliau telah dinafikan akses kepada peguambela tidak bertentangan dengan cabang kedua perkara

A 5(3) Perlembagaan Persekutuan dan oleh itu tidak merupakan suatu alasan untuk mana remedi yang berpatutan adalah habeas corpus.

(2) Isteri plaintif telah mengikrarkan afidavit untuk menyokong permohonan habeas corpus dengan betul dan telah merujuk kepada pengetahuan peribadinya kerana beliau telah berjumpa dengan
B plaintif di penjara Johor Bahru dan telah disuruh olehnya untuk mendapatkan perkhidmatan peguambela. Beliau telah menerangkan kedudukan dan kuasanya untuk mengikrar afidavit itu kerana beliau telah diberi kuasa untuk berbuat demikian oleh plaintif, memandangkan hakikat bahawa tidak terdapat pesuruhjaya
C sumpah di Kuala Kurau, Perak. Oleh itu, pengataan yang terkandung di dalam afidavitnya telah mematuhi A 41 k 5(1) dan (2) KMT.

(3) Oleh kerana pengataan isteri plaintif telah mematuhi A 41 k 5(1) dan (2) KMT, pengataan tersebut semestinya benar kerana defendan gagal mematahkannya di dalam afidavit mereka.

D (4) Tahanan plaintif yang berlanjutan di penjara Johor Bahru sebelum perintah sekatan di bawah s 2(ii) Akta itu telah dikeluarkan menyalahi undang-undang, bertentangan dengan undang-undang dan menjadikan perintah sekatan itu batal dan tidak sah dan penjelasan yang lemah yang diberikan oleh Timbalan Menteri
E mengenai kelengahan itu tidak dapat diterima oleh mahkamah.

(5) Walaupun pada asasnya, kaedah prosedur mesti dipatuhi dalam proses litigasi, sesuatu luar aturan atau kecacatan tidak akan menjadikan prosiding itu terbatal secara automatik kerana mahkamah mempunyai budi bicara di bawah A 2 k 1 KMT untuk membetulkan sebarang ketidakpatuhan dengan sesuatu kaedah
F prosedur.

(6) Bagaimanapun, di mana kebebasan seseorang individu menghadapi risiko akan lucut, mesti terdapat kepatuhan secara teliti dengan undang-undang dan apabila memohon untuk suatu writ habeas corpus, plaintif berhak bergantung kepada sebarang kecacatan
G teknikal yang mungkin mentaksahkan perintah yang melucutkan kebebasannya. Plaintif dibebaskan dengan serta-merta.]

Notes

For a case on denial of access to counsel, see 5 *Mallal's Digest* (4th Ed) para 1260.

H For a case on technical defects in the detention order, see 5 *Mallal's Digest* (4th Ed) para 1281.

For cases on the procedure in habeas corpus applications, see 5 *Mallal's Digest* (4th Ed) paras 1283–1291.

I **Cases referred to**

1 *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 137 (folld)

2 *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 (refd)

3 *Metroinvest Ansalt v Commercial Union Assurance Co Ltd* [1985] 1 WLR 513; [1985] 2 All ER 318 (folld)
4 *Leal v Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874; [1984] 2 All ER 207 (refd)
5 *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129 (refd)
6 *Dynacast (S) Pte Ltd v Lim Meng Siang & Ors* [1989] 3 MLJ 456
7 *Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Ors* [1993] 1 CLJ 261; [1993] 1 MLJ 12 (folld)
8 *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1986] 1 MLJ 426 (distd)
9 *Zakaria bin Hussin v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1994] 1 AMR 13: 730 (folld)
10 *Thor Kheng Chye v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1994] 1 AMR 14:768 (folld)
11 *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 (folld)
12 *Liversidge v Anderson* [1942] AC 206 (folld)

Legislation referred to
Rules of the High Court 1980 O 2 r 1

Ang Chun Pun (*CP Ang & Co*) for the plaintiff.
Mahmud bin Hj Abdullah (Federal Counsel) for the defendants.

Abdul Malik Ishak JC: On 25 October 1993, the Timbalan Menteri Hal Ehwal Dalam Negeri ('the timbalan menteri') issued an order for the arrest and detention of the plaintiff, Ng Chai Yang, pursuant to s 2(i) of the Restricted Residence Act 1933 (Rev 1989) ('the Act') on the ground that: 'Kamu adalah seorang penganjur judi empat nombor ekor haram di Bandaran Muar, Johor sejak tahun 1990.' The timbalan menteri was satisfied that it was not necessary to hold an enquiry under s 2(i) of the Act as, upon written information and documents, he had reasonable grounds for believing that the plaintiff should be required to reside elsewhere, namely, Bandaran Kuala Kurau, Daerah Krian, Perak.

On 31 October 1993, the plaintiff was arrested at the Shell petrol station, Jalan Bakri, Muar, Johor and detained at Johor Bahru prison after the administrative matters had been attended to. On 19 November 1993, the timbalan menteri issued a restriction order under s 2(ii) of the Act restricting the plaintiff to Bandaran Kuala Kurau, Daerah Krian, Perak for three years commencing from 19 November 1993 and placing the plaintiff under s 2A(i) of the Act under police supervision during that period. Both orders were served on the plaintiff on 19 November 1993. It was only on 20 November 1993 at 1am that the plaintiff was brought to Bandaran Kuala Kurau, Daerah Krian, Perak.

The plaintiff's wife by the name of Tan Chui Hong @ Ong Lee Feey affirmed an affidavit dated 13 January 1993 wherein she averred that she was told on 18 November 1993 by an unknown police officer from Muar police station that her husband would be required to reside at another area, to be precise 'buang negeri' and she was advised to wait at Tangkak police

station, in the district of Muar, on 19 November 1993 if she and her children wanted to see him. True enough, on 19 November 1993 at about 6.30pm, the plaintiff was escorted by police personnel to Tangkak police station and there she and the children met the plaintiff. Consequently, it was argued that the timbalan menteri did not sign the orders under ss 2(ii) and 2A(i) of the Act on 19 November 1993 but rather these orders were postdated.

The plaintiff's wife averred further in her affidavit that while under lawful detention at Johor Bahru prison, her husband was denied access to counsel, contrary to the second limb of art 5(3) of the Federal Constitution. Mr Ang Chun Pun submitted at great length on behalf of the plaintiff on this point. But, I am of the considered view that such a complaint will not run counter to the second limb of art 5(3) of the Federal Constitution and is not therefore a ground for which the proper remedy is habeas corpus. As Wee Chong Jin CJ Singapore (as he then was) put it nicely in *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor*[1] especially at p 141 col 2C–E:

> In my judgment habeas corpus is not an available remedy to a person who, after his arrest by the police and under lawful detention by the police under powers conferred by s 74 of the Act, has been refused by the police to be allowed his constitutional right under art 5(3) of the Constitution to be allowed to consult a legal practitioner of his choice. Such a person must seek other available remedies such as may be found in s 18(2) and the First Schedule of the Supreme Court of Judicature Act (Cap 15).

It was also deposed by the plaintiff's wife that her husband while being detained in the cell at Johor Bahru prison was denied writing materials and, thus, could not write to the timbalan menteri and, consequently, the plaintiff was not able to appeal to the timbalan menteri within 14 days, in breach of the requirement as set out in exh A2 of encl A at para 2. That requirement reads thus: 'Jika kamu ingin membuat apa-apa rayuan untuk pertimbangan saya, kamu boleh berbuat demikian dalam masa 14 hari selepas menerima alasan-alasan ini.'

Learned counsel for the plaintiff argued that the allegations (as set out above) made by the plaintiff's wife in her affidavit were not rebutted and they should be deemed to be admitted relying principally on the authority of *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor*.[2]

Encik Mahmud bin Hj Abdullah, the learned federal counsel argued, quite admirably, that the plaintiff's wife in her rather long affidavit failed to state the sources and grounds of her information and belief — thus rendering those offending paragraphs in her affidavit to be valueless. The offending paragraphs were labelled by the learned federal counsel as hearsay, irrelevant and compounded with unwarranted opinions and conjecture. Order 41 r 5(1) and (2) and r 6 of the Rules of the High Court 1980 ('the RHC') were relied upon by the learned federal counsel.

It is basic and fundamental that in the course of litigation, rules of procedure must be observed. But the courts have from time to time aware of the danger that too rigid an adherence to the rules in certain circumstances may inappropriately and unjustly deprive a party of his rights. For instance,

O 2 r 1 of the RHC says that non-compliance with a rule of procedure at whatever stage of the proceedings 'whether in respect of time, place, manner, form or content or in any other respect' is to be treated as an irregularity. It does not automatically 'nullify the proceedings, any step taken in those proceedings, or any document, judgment or order therein'. But the court is nevertheless empowered to set aside 'wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein' or to allow an amendment or 'to make such order ... generally as it thinks fit'. Incidentally, the court may also make an ancillary order as to costs or other terms as may be just. In short, O 2 r 1 of the RHC strictly concerns the discretion exercisable by the court when it is faced with non-compliance.

I am of the considered view that no irregularity or defect, whatever its nature, automatically renders the proceeding a nullity. The court is still empowered to consider each case on its merits and make whatever decision it deems just. I am fortified in my view by a passage appearing in the judgment of Cumming-Bruce LJ in *Metroinvest Ansalt v Commercial Union Assurance Co Ltd*[3] to the following effect [at p 521F–G]:

> I would say that in most cases the way in which the court exercises its powers under O 2 r 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe O 2 r 1(2) as being so framed as to give the court the widest possible power in order to do justice.

In *Leal v Dunlop Bio-Processes International Ltd*,[4] Stephenson LJ stated that the seriousness of the irregularity could be a basis for not exercising the discretion to cure it, whether real prejudice was caused or not. His Lordship succinctly said, 'The court's restraining hand is an important restriction on the misuse of ... procedure.' The Court of Appeal in Singapore in *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd*[5] held [at p 134] that: 'Notwithstanding the very wide powers given to court to remedy non-compliance with the [rules] ... there may be failure or non-compliance with the [rules] which is so fundamental or serious that the court ought not to exercise its discretion under r 1 to remedy it.' The learned federal counsel argued that the failure of the plaintiff's wife to comply with O 41 r 5(1) and (2) of the RHC went to the very root of the legal process — a 'defect of a fundamental nature' (*Dynacast (S) Pte Ltd v Lim Meng Siang & Ors*[6]) which could not be cured. Consequently, it was argued by the learned federal counsel, that the defendants need not reply to those allegations on the authority of *Teoh Yook Huwah v Menteri Hal Ehwal Dalam Negeri & Anor*[7] where Edgar Joseph Jr SCJ said at p 263, 'Consequently, the allegation of assault by the appellant's sister was worthless as evidence being entirely hearsay.'

And again at p 264 his Lordship said, 'It follows, therefore, that there being not a scrap of evidence that the appellant had been assaulted, there was nothing to rebut and so no need for an affidavit of denial.'

Who can affirm an affidavit on behalf of a detained person? *Mallal's Supreme Court Practice* at p 660 has the answer. It says:

A Where the person alleged to be illegally or improperly detained cannot by reason of the detention or for any other reason make the application for a writ of habeas corpus himself, some other person, eg his wife, may do so on his behalf. In such a case the affidavit in support of the application for the writ must state that fact and the reason why the person detained cannot affirm or make the affidavit. As a general rule the application should be made by counsel.

B Here, the plaintiff's wife rightly affirmed an affidavit in support of her application.

I shall now examine the affidavit affirmed by the plaintiff's wife dated 13 January 1994 to see whether she had failed to state the sources and grounds of her information and belief as alleged by the learned federal C counsel.

In para 1, she averred: 'Saya menegaskan di sini bahawa fakta-fakta yang dideposkan di sini adalah dalam pengetahuan saya kecuali dinyatakan sebaliknya.' Here, she adverted to personal knowledge unless otherwise shown.

In para 2, she explained her position and authority in affirming the D affidavit. She deposed:

> Saya adalah isteri kepada plaintif yang tersebut di atas dan saya diberikan kuasa dan kebenaran oleh plaintif untuk membuat afidavit ini. Plaintif tidak dapat membuat afidavit ini kerana kediaman beliau diterhadkan kepada Bandaran Kuala Kurau, Daerah Kerian, Perak dan di bandaran tersebut tidak ada E pesuruhjaya sumpah.

It was not challenged, at all, by the defendants that at Bandaran Kuala Kurau, Daerah Kerian, Perak there was not a single commissioner for oaths there (see for comparison *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman*,[8] where Zakaria Yatim J said (at p 429): 'Curiously enough, F Lorrain did not consider it fit to affirm an affidavit to state that he was not in Malaysia. Instead he asked the three persons to file their affidavits on his behalf. The court cannot give such weight to the contents of the three affidavits. In my opinion Lorrain has not discharged the onus and on this ground alone his application should be dismissed.')

In para 11, she further adverted to her personal knowledge: 'Saya telah G berjumpa dengan plaintif di penjara Johor Bahru dan saya dinasihatkan oleh plaintif supaya mendapatkan khidmat peguam untuk mengendalikan kes plaintif dengan lebih teratur dan kerana plaintif katakan tanpa peguam beliau langsung tidak tahu apa tindakan yang perlu diambil olehnya di dalam masa/tempoh 'kecemasan' seperti kes ini di mana plaintif dikurung H dalam penjara.'

I need not go into detail but it is germane to state that the subsequent paragraphs of the affidavit of the plaintiff's wife comply with O 41 r 5(1) and (2) of the RHC. This point should rightly go to the plaintiff. It followst therefore that the allegations that the orders were postdated must be true as the defendants failed to rebut it in their affidavits.

I Next, the prolonged detention of the plaintiff at Johor Bahru prison before the timbalan menteri issued the restriction order under s 2(ii) of the Act was said to be illegal, contrary to law and rendered the restriction order null and void. This is certainly a legitimate point and the timbalan menteri's

feeble explanation for the delay cannot be accepted by the court (see *Zakaria bin Hussin v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors*[9] and *Thor Kheng Chye v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors*[10]).

Where the liberty of an individual is at stake, there must be meticulous compliance with the law. In *Re Datuk James Wong Kim Min*[11] especially at p 251, Lee Hun Hoe CJ (Borneo) (as he then was) had this to say:

> In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorizing detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.

As to the role of judges in adjudicating cases of this nature, Lord Atkin in *Liversidge v Anderson*[12] had this to say at p 244:

> It has always been one of the pillars of freedom ... that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

For the reasons adumbrated above, I set the plaintiff at liberty forthwith.

Application allowed.

Reported by Anne Khoo